Decision 01-11-071 November 29, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Authority to Lease Available Land on the West Lugo-Mira Loma 500 kV Transmission Right of Way to Chuka Foods, Inc.	Application 00-12-041 (Filed December 21, 2001)

ORDER CLARIFYING DECISION 01-08-022 AND DENYING REHEARING

I. SUMMARY

By this Order, the Commission denies rehearing of Decision 01-08-022 ("the Decision"). The Decision approved the application made by Southern California Edison Company pursuant to Public Utilities Code section 851 for authority to lease property to Chuka Foods, subject to submission of necessary environmental review documents within 120 days. The Decision also provided that in the future, the Commission would no longer make such conditional approvals, but instead would require any necessary environmental review documents to be included with the section 851 application. This Order clarifies that environmental studies need not be included *at the time of filing;* however, no application will be deemed complete, and the Commission will not approve any application, until it has before it all necessary environmental review studies.

Applications for rehearing were filed by: (1) Southern California Edison Company ("SCE"), and (2) California Cable Television Association, MCI WorldCom Communications, Inc. and ICG Telecom Group, Inc. ("Joint Applicants"). SCE challenges only the requirement that in the future, environmental review documents be included along with the section 851 application, arguing that this is inconsistent with the

California Environmental Quality Act ("CEQA") and would cause unnecessary delay in the application process.[1] Joint Applicants also challenge only the portion of the Decision pertaining to future section 851 applications, arguing that the new provision violates the notice requirements in Public Utilities Code sections 1708 and 311(e), should not have been made in the context of a ratemaking proceeding according to section 1701.1, is inconsistent with CEQA, and is contrary to the public interest. We have considered all of the arguments set forth in SCE and Joint Applicant's applications for rehearing, and find them to be without merit. Therefore, the requests for rehearing are denied.

II. BACKGROUND

On December 21, 2000, SCE filed an application for a 20-year lease of land located on the West Lugo-Mira Loma 500 kV Transmission line in the City of Ontario to Chuka Foods, Inc. Chuka Foods intends to develop and operate a retail shopping center on the property. Public Utilities Code section 851 requires utilities to file such an application with the Commission prior to the sale, lease, or other encumbrance of utility property. This process allows the Commission to determine whether the proposed transaction is in the public interest, and whether the intended use of the property would interfere with the purpose and obligations of the utility to maintain safe and reliable facilities. In D.01-08-022, we approved the unopposed application of SCE after determining that there would be no interference with electrical transmission facilities on the site, and that revenues from such a secondary use of the property would benefit the utility, shareholders and ratepayers.

Under CEQA, such a discretionary decision made by a public agency, without which the project cannot proceed, requires us to consider the environmental consequences of the project. (Public Resources Code section 21080.) As a public agency with legal responsibility for approving a project, but not as the principle agency for approving the project, the Commission is a Responsible Agency for CEQA purposes.

[1] CEQA is found at California Public Resources Code, Division 13, Section 21000, et seq.

(Public Resources Code section 21069.) As we stated in the Decision, when acting as a Responsible Agency, we defer to local authorities to act as the Lead Agency responsible for preparing an Environmental Impact Report (EIR) or Negative Declaration for the project, or determining that the project is exempt under CEQA. (CEQA Guidelines section 15050.)[2]

III. DISCUSSION

In the Decision, approval of SCE's section 851 application was conditioned upon submission of all necessary environmental documents within 120 days, and upon the condition that the lessee (Chuka Foods) comply with all applicable environmental regulations. In addition, we stated that for future applications, we will require all utilities to include with their applications all necessary environmental review documentation prepared by the Lead Agency.[3] Both SCE and Joint Applicants object only to the latter provision.

SCE maintains that the Commission has adopted a "blanket rule" premised on the assumption that all section 851 applications will require CEQA review. (SCE Rehearing Appl. at p. 5.) This allegation misreads the Decision. The Commission will continue to review section 851 applications on an individual basis, and the particular facts of each case will determine whether CEQA review is appropriate. There is no foundation for the allegation that the Commission assumes all section 851 applications will require CEQA review. In the Decision, we stated "we will require the utility to include with its applications copies of the necessary documents issued by the local entity acting as the Lead Agency . . . or that the Lead Agency found that the project in question is exempt

[2] The CEQA Guidelines are found at California Code of Regulations, Title 14, Division 6, Chapter 3 Section 15000, et seq.

[3] The Decision provided the following: "However, to ensure that no development will take place without CEQA review by the appropriate agency, the Commission now proposes to change its procedures for future applications. Henceforth, we will require the utility to include with its applications copies of the necessary documents issued by the local entity acting as the Lead Agency to establish that the environmental review has been conducted and any mitigation measures required under CEQA have been imposed, or that the Lead Agency found that the project in question is exempt from CEQA. The Commission would then assume the role of Responsible Agency for CEQA purposes." (Decision at p. 7.)

from CEQA." (See Decision at p. 7.) The Decision simply provides that where CEQA review is required, documents issued by the Lead Agency must be included as part of the section 851 application. The language in the Decision does not affect the obligations of the Lead Agency to determine whether the project will require an EIR, Negative Declaration, or is exempt under CEQA, nor does it affect our ability to decide, in some circumstances, that consideration of an 851 application does not involve a project that triggers the need for further analysis under CEQA.

SCE asserts that CEQA review is not triggered where there is no definite plan for development of the property in question, as the application would not rise to the level of a "project" under CEQA. (SCE Rehearing Appl. at pp. 7-8.) SCE is mistaken on this point. Under CEQA, a "project" is defined as any activity that may cause a reasonably foreseeable change in the environment. (Public Resources Code section 21065.) Applications under section 851 for a transfer or lease of utility property routinely involve a change in use, such as future construction, which is likely to cause a change in the environment, and therefore requires the Commission to evaluate whether CEQA review is necessary, notwithstanding the fact that project plans may yet be inchoate. Parties maintain the right to file a motion for determination of applicability of CEQA pursuant to the Commission's Rule 17.2. (See Public Utilities Commission Rules of Practice and Procedure, tit. 20, Cal. Code Regs., section 8.2, ("Commission Rules"), Rule 17.2.) However, CEQA does not allow environmental review to be circumvented by piecemealing or segmenting projects, and the Commission will require, as its usual practice where environmental impacts are reasonably forseeable, documentation of some level of CEQA review (an EIR, Negative Declaration or exempt status) prepared by the Lead Agency as part of the 851 application before the Commission will issue a decision to approve the application. This requirement fully comports with CEQA.

SCE argues that that the Commission misunderstands its role as the Responsible Agency. SCE further maintains that under CEQA, the Commission must accept and process section 851 applications concurrently with the Lead Agency's review, and to require CEQA documentation at the time of filing is "backwards." (SCE

Rehearing Appl. at pp. 9-11.) The Joint Applicants make a related argument, stating that the Decision contravenes the Commission's role as Responsible Agency and the requirements of CEQA. (Joint Applicants Rehearing Appl. at p. 5.) There is no merit to these allegations. As to the first allegation, there is no basis for the allegation that the Commission misunderstands its duties as a Responsible Agency. These responsibilities are set forth in Public Resources Code 21080, and CEQA Guidelines 15050, 15091, and 15096, and we see no need to reiterate those obligations within the context of this Decision.

As to the second allegation, while it had been our practice in similar section 851 applications to permit conditional approval regarding the transfer of property subject to future compliance with environmental regulations, conforming treatment of these applications with our practice in other types of applications is legally required under CEQA. The CEQA Guidelines specifically provide, "[p]rior to reaching a decision on the project, the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration." (CEQA Guidelines 15050(b), 15096(f).) This practice is also consistent with our obligations under the Public Utilities Code. In approving a section 851 application, we must determine whether the application is in the public interest. (Public Utilities Code section 851; Decision at p. 6.) In order to make an informed decision, we must have before us sufficient details regarding the proposed project and future use of the property.

While there is no question that under CEQA, the Lead Agency must complete its environmental review studies prior to the Responsible Agency's rendering a decision to approve a project, the disputed language in the Decision could be read as requiring applicants to submit environmental review documents at the time the section 851 application is filed. This goes beyond the legal requirements of CEQA. Therefore, we clarify in this Order that the applicants are not required to submit completed environmental studies at the time of filing; however, they should inform the Commission of the local environmental review process early enough to ensure that the Commission can fulfill its duties as a Responsible Agency. Moreover, the Commission will not render

a decision to approve a section 851 application before it has considered the appropriate environmental studies, and no section 851 application will be deemed complete by the Commission until said environmental review studies have been submitted. Thus, these provisions reflect implementation procedures in conformance with CEQA and the Public Utilities Code by ensuring that all necessary CEQA documentation is available for our consideration before we approve an application.

SCE argues that deferring approval of section 851 applications until local environmental review is completed will delay lease agreements and result in a loss of revenue. (SCE Rehearing Appl. for Rehearing at p. 11.) Similarly, Joint Applicants contend that the Decision will delay the processing of applications. (Joint Applicants Rehearing Appl. At p. 6.) We are not persuaded by these arguments, and applicants have not demonstrated that this change in the sequencing of events will lengthen the environmental review process. Regardless of whether we approve the section 851 application subject to environmental review, or require the environmental review to take place first, under either scenario, environmental review must be complete before any transfer of property can take place. Assuming SCE is correct regarding a potential loss of revenue, it is not clear how that circumstance would release the Commission from its obligation under CEQA Guidelines 15050(b) and 15096(f).

Joint Applicants argue that under Public Utilities Code section 1708, the Commission is not permitted to alter its existing rules and practices without giving proper notice to the affected utilities and other entities. (Joint Applicants Rehearing Appl. at p. 3.) Joint Applicants misinterpret the applicability of this section. Section 1708 allows the Commission to rescind, alter or amend any order or decision upon proper notice and opportunity to be heard to parties.[4] Here, there is no applicable commission order or decision that has been changed. The requirement that a Responsible Agency review the

[4] Section 1708 provides in pertinent part, "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it."

environmental documents prepared by the lead agency prior to making its determination is a function of the CEQA regulations and guidelines, rather than a Commission decision. Joint Applicants do not reference any Commission order or decision, and in fact, there is no Commission order or decision that requires us to approve section 851 applications before we have evidence that CEQA review has been completed.

Joint Applicants maintain that this change in our practice should have been announced in a separate rulemaking proceeding before the Commission, R.00-02-003. (Joint Applicants Rehearing Appl. at p. 3.) This argument is without merit. The R.00-02-003 rulemaking proceeding involves the Commission's CEQA implementation practices as applied to telecommunication utilities, and is unrelated and unaffected by the Decision regarding section 851 applications. Moreover, the Commission is not required to institute a rulemaking proceeding simply to conform a staff practice to the law. In a related argument, Joint Applicants assert that the Decision transforms a ratesetting proceeding into a rulemaking proceeding, and is inconsistent with Public Utilities Code section 1701.1 in that it establishes rules affecting an entire industry in a ratesetting proceeding, rather than in a quasi-legislative proceeding. (Application for Rehearing at pp. 4-5.) We disagree with Joint Applicants on this point. In our Decision, we did not establish a new rule, but rather, applied existing law. The provisions in the Decision regarding treatment of future 851 applications will merely correct our former policy in order to meet the legal requirements of CEQA. The Commission is bound to follow CEQA and has no discretion in this regard.

Finally, Joint Applicants contend that the Decision violates Public Utilities Code section 311(e) because the revision to the Proposed Decision comprises a material change and therefore constitutes an alternate decision that was not served on all parties and made subject to review and comment. (Joint Applicants Rehearing Appl. at p. 4.) This argument is flawed, as the Decision does not meet the definition of an alternate as defined in the Public Utilities Code and the Commission's Rules. Under section 311(e) the Commission is required to serve an alternate decision on all parties and to provide a 30-day public review and comment period before any final decision is voted upon. Joint

Applicants are correct insofar as an alternate decision is defined in section 311(e) as "a substantive revision to a proposed decision that materially changes the resolution of a contested issues or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs." (Public Utilities Code section 311(3).) However, section 311 also provides that the Commission shall adopt further rules implementing the requirements of this section. Accordingly, section 311 must be read in conjunction with the Commission's Rules of Practice and Procedure, which implement the public review and comment requirements of Section 311 and provide a more detailed definition of a Commission "alternate."

Under the Commission's Rules, an "alternate" is further defined, as follows:

> (a) For purposes of this rule, "alternate" means a substantive revision *by a Commissioner* to a proposed decision not prepared by that Commissioner, which revision either: (1) materially changes the resolution of a contested issue, or (2) makes any substantive addition to the finding of fact, conclusions of law, or ordering paragraphs.
>
> *A substantive revision to a proposed decision is not an "alternate" if the revision does no more than make changes suggested in prior comments on the proposed decision, or in a prior alternate to the proposed decision.*
>
> (Commission's Rules of Practice and Procedure, Tit. 20, California Code of Regulations, Rule 77.6(a), emphasis added.)

Therefore, the Decision does not meet the definition of an alternate because the revision merely incorporates a change already proposed in the Alternate Draft Decision of Commissioner Wood. The Wood Alternate provided that section 851 applications must include environmental review documents. (Wood Alternate Decision at p. 7.) The alternate was circulated on July 19, 2001, and comments were subsequently filed by SCE and other interested persons related to the proposed change in CEQA procedures.

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IV. CONCLUSION

For the reasons stated above, we deny SCE and Joint Applicant's applications for rehearing, as no legal error has been shown.

Therefore, IT IS ORDERED that:

1. SCE's application for rehearing is denied.
2. Joint Applicant's application for rehearing is denied.
3. This proceeding is closed.

This order is effective today.

Dated November 29, 2001 at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners